

McGREGOR  
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Via Email and Certified Mail

February 24, 2024

Laura M. Gregory, Chair  
Town of Andover Select Board  
36 Bartlet Street  
Andover, MA 01810  
[laura.gregory@andoverma.us](mailto:laura.gregory@andoverma.us)

**RE: NOTICE OF INTENT TO SUE  
Article 97 & An Act Preserving Open Space in the Commonwealth  
Haggetts Pond Rail Trail – 0, 51R, and 52 Haggetts Pond Road**

Dear Chair Gregory and Members of the Select Board:

This is a notice of intent to sue pursuant to M.G.L. c. 214, § 7A (“Notice”) for injunctive relief to prevent irreparable harm to the environment. This firm represents thirteen citizens of the Commonwealth, all of whom reside in Andover<sup>1</sup> (the “Citizens Group”) with respect to the Town of Andover’s (the “Town”) proposal to construct approximately 1.18 miles of impervious asphalt trail on a previously unimproved former railroad bed, a “boardwalk spur” through wetlands, the paving and expansion of an existing pervious parking area, and the creation of additional impervious parking (the “Project”) at 0, 51R, and 52 Haggetts Pond Road in Andover (Assessor’s Map 195, Lots 1 and 2 and Map 196, Lot 14) (collectively, the “Property”).

For the reasons set forth below, it is our opinion that the Town acquired and holds the Property for conservation purposes – specifically, protection of a public drinking water supply – and may not change the use of the Property to construct the Project without complying with Article 97 of the Amendments to the Massachusetts Constitution (“Article 97”), An Act Preserving Open

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<sup>1</sup> Specifically, the Citizens Group consists of the following Massachusetts citizens domiciled within the Commonwealth and residing in Andover: (1) Rosemary Halloran, 197 Haggetts Pond Rd.; (2) Kathleen Grant, 83 Morton St.; (3) Elizabeth Walther-Grant, 83 Morton St.; (4) Alan S. Harris, 197 Haggetts Pond Rd.; (5) Sandra Galley, 10 Yale Rd.; (6) Steven Walther, 83 Morton St.; (7) Sara Schmitt, 7 Knollcrest Dr.; (8) Steven Schmitt, 7 Knollcrest Dr.; (9) Shilpi Ranjan, 149 Haggetts Pond Rd.; (10) Raghav Ranjan, 149 Haggetts Pond Rd.; (11) Michael Silverman, 54 Tewksbury St.; (12) Lenie Silverman, 54 Tewksbury St.; and (13) Lindsay Concemi, 19 Graybirch Rd.

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Space in the Commonwealth (M.G.L. c. 3, § 5A) (the “Act”), the Massachusetts Executive Office of Environmental and Energy Affairs’ (“EEA”) Land Disposition Policy, and the Massachusetts Environmental Policy Act (“MEPA”).

The Citizens Group seeks the Town’s immediate compliance with Article 97, the Act, the Land Disposition Policy, and MEPA.<sup>2</sup>

This Notice is sent pursuant to M.G.L. c. 214, § 7A which states:

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

Pursuant to M.G.L. c. 214, § 7A, notice is hereby given that the Citizens Group intends to bring a civil action in Superior Court at least twenty-one days after this Notice to seek equitable and/or declaratory relief concerning the violations of law and impending harm to the environment described herein, if the Town does not meet its obligations under Article 97, the Act, the Land Disposition Policy and MEPA.

### **BACKGROUND**

#### *ARTICLE 97 AND THE ACT*

Article 97 was enacted by Massachusetts voters in 1972 to explicitly establish the citizenry’s right to use and enjoy the natural environment. Article 97 codifies the public interest in conserving natural areas and open space by providing that:

[t]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air, and other natural resources is hereby declared to be a public purpose.

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<sup>2</sup> We also note that the Executive Office of Energy and Environmental Affairs is in the process of promulgating regulations under the Act. The Citizens Group seeks the Town’s compliance with these regulations should they be promulgated during the other review and approval processes listed above.

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Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

Thus, Article 97 creates a procedural protection for public lands taken, acquired, or designated for natural resource or outdoor recreation purposes by requiring a super-majority, two-thirds vote of each chamber of the Legislature to transfer, change the use, or otherwise dispose of open space or parkland taken, acquired and/or designated for its purposes.

In 1998, EEA adopted its Article 97 Land Disposition Policy. The goal of this policy is to ensure no net loss of Article 97 lands.

To further codify Article 97, the Massachusetts Legislature enacted An Act Preserving Open Space in the Commonwealth, M.G.L. c. 3, § 5A. The Act became effective in February 2023, and explicitly sets forth the administrative processes, documentation, and criteria that must be satisfied prior to any transfer, change in use, or other disposition of public natural resource lands, waters, and other real estate interests protected by Article 97. The Act requires proponents to conduct an alternatives analysis, appraise the value of the land and the use of the land, and identify replacement land. EEA reviews these and other submissions from a municipality (or other proponent) seeking Article 97 legislative approval.

### *51R AND 52 HAGGETTS POND ROAD*

Upon information and belief, the Town acquired record title to 51R and 52 Haggetts Pond Road (Assessor's Map 195, Lot 1; Map 196, Lot 14, respectively) by eminent domain by instrument of taking dated May 24, 1932 and recorded at the Essex North Registry of Deeds Book 564, Page 168–169.<sup>3</sup> Such taking was “for the purpose of creating more sanitary conditions for the protection of the water supply of the Town . . . .”

51R and 52 Haggetts Pond Road are under the care, custody and control of the Town of Andover Water Department.<sup>4</sup> Protection of public water supply is a “public purpose” under Article 97. *See* Article 97 (“conservation, development and utilization of . . . water . . . and other natural resources is hereby declared to be a public purpose”); Rep. A.G., Pub. Doc. No. 14, 131 (1980) (Department of Environmental Management’s acquisition of Otis Reservoir pursuant to Chapter 457 of the Acts of 1966 “for the protection of water supply, and for conservation and recreation . . . .” is a conservation-related purpose under Article 97).

### *0 HAGGETTS POND ROAD*

Upon information and belief, the Town acquired record title to 0 Haggetts Pond Road (Assessor's Map 195, Lot 2) by deed dated June 26, 1896 and recorded at the Essex North Registry

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<sup>3</sup> See enclosed deed and plan of land.

<sup>4</sup> See *Town of Andover, Massachusetts Open Space and Recreation Plan* (May 2018) at p. 59.

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of Deeds Book 154, Page 456–457 (recorded May 4, 1897).<sup>5</sup> This parcel is currently under the care, custody, and control of the Town of Andover Water Department. See *Town of Andover, Massachusetts Open Space and Recreation Plan* (May 2018) at page 59 stating that 0 Haggetts Pond Road is under the control of the Water Department and that Water Department land is Article 97 land. As discussed above, protection of public water supply is a protected “public purpose” under Article 97.

### THE PROJECT

The Project proposes to pave a 1.02 mile long impervious asphalt trail on a previously unimproved railroad bed, construct a boardwalk through wetlands to the bank of Haggetts Pond, pave and expand an existing impervious parking area, and create a new impervious parking lot.

The Project is proposed within or near Bordering Vegetated Wetlands, Riverfront Area of two perennial streams, Bank, and Land Under Water, which are all jurisdictional resources areas protected by the Massachusetts Wetlands Protection Act (M.G.L. c 131, § 40) and the Town of Andover Wetlands Protection Bylaw. Additionally, the Project is proposed within or near Isolated Vegetated Wetlands and vernal pools, which are jurisdictional resources areas protected by the Town of Andover Wetlands Protection Bylaw. These jurisdictional resource areas are significant to private and/or public water supply, groundwater, flood control, storm damage prevention, prevention of pollution, wildlife habitat, and fisheries. Further, the northern half of the proposed trail is within Natural Heritage Endangered Species Program Priority and Estimated Habitat areas (Priority Habitat 756 and Estimated Habitat 604).

The Project proposes to add approximately 8,491 square feet of new impervious surface and alter 17,880 square feet within the Riverfront Area.

The Project will result in significant tree loss. The Town agrees that 57 “significant” tree will be removed during the Project. The Town defined “significant” as trees greater than ten inches in diameter taken between 6-12 inches from the ground. This number does not account for any trees, shrubs, or other vegetation that do not meet the definition of “significant.” Additionally, the Town proposes to cut the roots of trees to install a root barrier between the tree roots and new paved trail. There are a significant number of large trees on the Bank of Haggetts Pond that are within feet and inches of the proposed trail and post-and-rail fence, respectively. Cutting the roots of these trees so close to the trunk of the trees will damage trees and may ultimately kill the trees. If the trees on the Bank of Haggetts Pond are damaged or killed, the Bank’s stabilization will ultimately deteriorate.

Finally, the Project proposes excavation within the old railroad bed, which is likely to contain residual oil and/or hazardous materials. Along some portions of the proposed trail, this excavation will occur within feet of Haggetts Pond and the Town’s public drinking water supply.

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<sup>5</sup> See enclosed deed.

**THE PROPERTY IS ARTICLE 97 LAND**

The Town’s proposed development of the Property involves work on three separate parcels of land, specifically, 0, 51R, and 52 Haggetts Pond Road in Andover, MA (Assessor’s Map 195, Lots 1 and 2 and Map 196, Lot 14). At least two of these parcels were acquired explicitly for the Article 97 purpose of protecting public water supply and, consistent with that purpose, each of the three parcels is presently under the care, custody and control of the Town’s Water Department.

The Massachusetts Supreme Judicial Court announced in *Smith v. City of Westfield*, 478 Mass. 49, 62-63 (2017), that Article 97 protection extends to land that has clearly and unequivocally been dedicated for Article 97 purposes. The Court ruled that one should consider the “totality of the circumstances” in making this determination, including but not limited to the chain of title in the Registry of Deeds. *Id.* at 64.

Here, the chain of title for two parcels (51R and 52 Haggetts Pond Road) shows that the land was taken for the Article 97 purpose of public water supply protection. The Town’s actions following acquisition of all three parcels that make up the Property – transferring the Property to the care, custody and control of the Andover Water Department – demonstrate a clear and unequivocal dedication of the entire Property “to the conservation, development and utilization of ... water ... and other natural resources” triggering Article 97 protection. Consequently, Article 97 legislative approval – as well as compliance with the Act and Land Disposition Policy – is required prior to execution of any transfer, change in use or other disposition of the Property.

Thus, the Town’s proposed change of use of the Property from open space held for the protection of public water supply to a paved recreational facility, including a paved parking area, constitutes a change in use under Article 97 and the Act. As such, the Town is required to comply with Article 97, the Act and the Land Disposition Policy before proceeding with the Project.

In addition to Article 97, the Town’s proposed change of use of the Property requires review under MEPA. See 301 CMR 11.03(1)(b)(3). The proposed change in use requires the filing of an Environmental Notification Form and other MEPA review if the Secretary of EEA so requires.

**THE PROJECT CONSTITUTES DAMAGE TO THE ENVIRONMENT**

Under G.L. c. 214, § 7A, “damage to the environment” means:

any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the

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environment shall not include any insignificant destruction, damage or impairment to such natural resources.

The Property is adjacent to Haggetts Pond, which is a Great Pond, a Class A Outstanding Resource Water protected under the Massachusetts Surface Water Quality Standards (314 CMR 4.00), contributes to the Town's public water supply, and is a valuable natural resource in its own right. The Property is held by the Town for the protection of public water supply, and therefore protected by Article 97. The Town's failure to comply with Article 97, the Act, the Land Disposition Policy, and MEPA constitutes a violation of laws whose major purpose is to prevent or minimize damage to the environment. As discussed above, the Project will destroy, damage, and impair the natural resources of the Commonwealth. The Project will cause water pollution; impair Haggetts Pond, two perennial streams, and the Town's public water supply; and destroy wetlands.

### CONCLUSION

Please be advised of the Citizens Group's intent to file suit in Superior Court pursuant to M.G.L. c. 214, § 7A after twenty-one days of the date hereof seeking equitable or declaratory relief concerning the imminent violations described herein, if the Town of Andover does not satisfy its obligations under Article 97, the Land Disposition Policy, the Act, and MEPA.

Other parties or causes of action other than G.L. c. 214, § 7A, may be included in the Superior Court civil action. This notice letter shall not in any way limit the rights of any of the individuals or entities named herein, or of any other person, to initiate a cause of action under G.L. c. 214, § 7A or another law, with regard to the Town's proposed development of the Property. Rights to bring such an action are explicitly reserved.

Notice is also hereby given that the above-named citizens of the Commonwealth also request that the Attorney General and EEA Secretary take steps to protect the Commonwealth's interest in this Article 97 land.

Thank you for your attention to this matter.

Very truly yours,

*Caroline E. Smith*

Caroline E. Smith

Enclosures

McGREGOR LEGERE & STEVENS

cc: Rebecca Tepper, Secretary  
Executive Office of Energy and Environmental Affairs  
100 Cambridge Street, Suite 1020  
Boston, MA 02114  
[Rebecca.Tepper@mass.gov](mailto:Rebecca.Tepper@mass.gov)

Andrea Joy Campbell, Attorney General  
Environmental Protection Division  
Office of the Attorney General  
1 Ashburton Place, 20<sup>th</sup> Floor  
Boston, MA 02108

Douglas W. Heim, Esq.  
Andover Town Counsel  
36 Bartlet Street  
Andover, MA 01810  
[Douglas.heim@andoverma.us](mailto:Douglas.heim@andoverma.us)

acknowledged the foregoing instrument to be his free act and deed, before me Jean E. Townsend, Notary Public. My commission expires Nov. 25, 1938. (seal). Pursuant to General Laws, Chapter 167, section 26, I hereby certify that the foregoing instrument is a true copy of the certificate of appointment of said John J. Grady as Agent, on file in the Office of the Commissioner of Banks for the Commonwealth of Massachusetts. Arthur Guy, Commissioner of Banks (Seal). A true copy, Attest: Hollis L. Cameron, Asst. Clerk.

Essex, ss. Received May 24, 1932, at 17mpast 10A.M. Recorded and Examined.

Taking of Land  
Boston &  
Maine Railroad  
to  
Inhabitants of  
Town of  
Andover

See Plan #872

Town of Andover, in the Board of Selectmen. May 20th, 1932. Voted, that The Inhabitants of the Town of Andover, acting by their Board of Selectmen, by virtue of the authority of the vote passed in connection with Article 11 as contained in the warrant for the annual Town Meeting held March 7, 1932, said vote having been passed at the legally adjourned meeting of March 14, 1932, take and does hereby take by right of Eminent Domain in fee with the trees, if any, located upon the premises, for the purpose of creating more sanitary conditions for the protection of the water supply of the Town, the land situated in that part of the Town of Andover known as the West Parish, and hereinbelow bounded and described, consisting of Parcels 1 and 2 as shown on a plan entitled, "Town of Andover, plan of proposed Taking from the Boston and Maine Railroad, February 1932, Board of Public Works" made by Edward R. Lawson, Asst. Supt., which plan is to be recorded with this vote of taking, and a description of which parcels according to said plan is as follows: (PARCEL I. Beginning at the southwesterly corner thereof at a point marking the junction of the northerly line of Lowell Street with the westerly location line of the Boston & Maine Railroad; thence north 0° 20' 22" west by said location line 769.82 feet to the southerly line of Haggetts Pond Road; thence south 76° 35' 22" east by the southerly line of Haggetts Pond Road 76.44 feet to the easterly line of the Boston & Maine Railroad location; thence south 0° 20' 22" east by said easterly location line 751 feet to the northerly line of Lowell Street above mentioned; thence south 89° 09' 38" west by said northerly line of Lowell Street 74.25 feet to point of beginning. Containing 1.3 acres more or less.) PARCEL II. Beginning at the southwesterly corner thereof at a point marking the junction of the northerly line of Haggetts Pond Road with the westerly location line of the Boston & Maine Railroad; thence north 0° 20' 22" west by said westerly location line 483.83 feet to a point; thence by a curve to the right of radius 2032.09 feet, a distance of 1105.60 feet to a point; thence north 30° 50' east still by the said westerly location line 2396.84 feet to a point; thence



south 59° 10' east still by said location line 4.13 feet to a point; thence north 30° 50' east by said location line 932.25 feet to a point; thence north 11° 40' west 375 feet more or less to a point in the southeasterly line of High Plain Road; thence northeasterly by said southeasterly line of High Plain Road 270 feet more or less to a point; thence northerly a little more easterly still by said southeasterly line of High Plain Road 240 feet more or less to a point marking the junction of said southeasterly line of High Plain Road with the easterly location line of the Boston & Maine Railroad; thence south 27° 31' west by said easterly location line of the Boston & Maine Railroad 108' more or less to a point; thence by a curve to the right of radius 5498.07 feet a distance of 313.27 feet to a point; thence south 30° 50' west 330 feet more or less to a point; thence south 11° 40' east 2.03 feet to a point; thence south 30° 50' west 3252.57 feet to a point; thence by a curve to the left of radius 1957.84 feet a distance of 1065.20 feet to a point; thence south 0° 20' 22" east 502 feet to a point in the northerly line of Haggetts Pond Road, all of said courses being by the easterly location line of the Boston & Maine Railroad; thence north 76° 35' 22" west by said northerly line of Haggetts Pond Road 76.44 feet to point of beginning. Containing 12.6 acres more or less. And be it further voted: That the said Board of Selectmen does hereby award unto the Boston and Maine Railroad as damages in full for the above taking the sum of five hundred (\$500.) dollars, and that the Board of Selectmen, in behalf of the said Inhabitants of the Town of Andover, sign and execute this taking, and affix thereto the seal of the said Inhabitants of the Town of Andover, and cause this taking, signed by the said Board of Selectmen, with the plan aforesaid, to be recorded in Essex North District Registry of Deeds, and that the Town Clerk give notice to the Boston and Maine Railroad in connection with this vote. Inhabitants of the Town of Andover, By Frank H. Hardy, Andrew McTernan, Jeremiah J. Daly, Board of Selectmen. (Corporate Seal).

Essex, ss. Received May 24, 1932, at 12M Recorded and Examined.

KNOW ALL MEN BY THESE PRESENTS, that we, the Gulf Refining Company of Pennsylvania and John W. McCarthy, of Lawrence, in the Commonwealth of Massachusetts, IN CONSIDERATION OF one dollar and other valuable considerations paid by the Lawrence Gas & Electric Company, a body corporate of Lawrence, in said Commonwealth, the receipt whereof is hereby acknowledged, do hereby grant and convey to said Lawrence Gas & Electric Company the right and privilege of laying gas mains in and through the following described land in said Lawrence, namely: A way known as Dracut Street beginning at a point on South Broadway 220 feet north of East

Easement

Gulf Refining Co.  
et al  
to  
Lawrence Gas  
& Electric Co.

ANDOVER MASS.

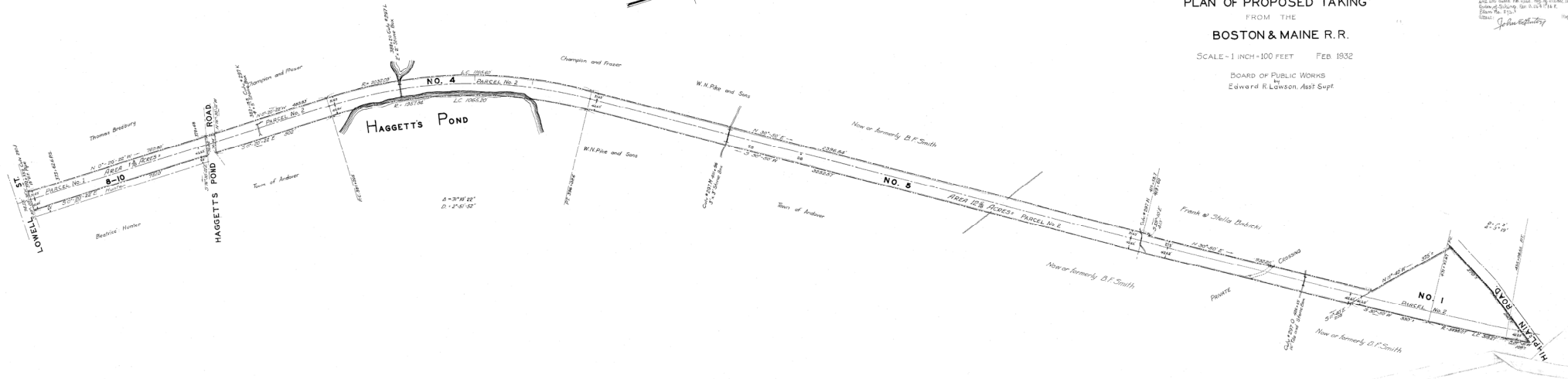


# TOWN OF ANDOVER PLAN OF PROPOSED TAKING

FROM THE  
BOSTON & MAINE R.R.  
SCALE - 1 INCH = 100 FEET FEB 1932

BOARD OF PUBLIC WORKS  
by  
Edward R. Lawson, Asst Supt.

Surveyed May 24, 1932 and 1933. Made by  
and any other the State, any of the cities,  
Counties, or other political subdivisions  
of the State.  
Signed: J. P. Estlin, Surveyor



thereon, by public auction on said premises first publishing a notice of the time and place of sale once each week for three successive weeks in some one newspaper published in said County of Essex and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar me and all persons claiming under me from all right and interest in the granted premises, whether at law or in equity. And out of money arising from such sale the grantee or his representatives shall be entitled to retain all sums then secured by this deed, whether then or thereafter payable, including all costs, charges and expenses incurred or sustained by them by reason of any default in the performance or observance of the said condition, rendering the surplus, if any, to me or my heirs or assigns; and I hereby, for myself and my heirs and assigns, covenant with the grantee and his heirs, executors, administrators and assigns that, in case a sale shall be made under the foregoing power, I or they will upon request execute, acknowledge and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale. And it is agreed that the grantee, or his executors, administrators, or assigns, or any person or persons in their behalf, may purchase at any sale made as aforesaid, and that no other purchaser shall be answerable for the application of the purchase money; and that, until default in the performance or observance of the condition of this deed, I and my heirs and assigns may hold and enjoy the granted premises and receive the rents and profits thereof. In witness whereof I the said Fred L. Sargent not being married have hereunto set my hand and seal this third day of May in the year one thousand eight hundred and ninety seven: . . . . . } Fred L. Sargent (seal)

Signed, sealed and delivered in presence of N. P. Frye. Commonwealth of Massachusetts, Essex ss. May 3<sup>rd</sup> 1897. Then personally appeared the above named Fred L. Sargent and acknowledged the foregoing instrument to be his free act and deed, before me, Newton P. Frye, Justice of the Peace.

Received and recorded May 4, 1897 at 9-38 A.M. attest. Aretas R. Sanborn Reg'r.

Hardy et al Know all men by these presents that we, Edward S. Hardy  
to and Frederick L. Hardy, both of Andover in the Commonwealth  
Inhabitants of Massachusetts in consideration of one dollar paid by the In-  
of Andover habitants of Andover the receipt whereof is hereby acknowledged

do hereby give, grant, bargain, sell and convey unto the said Inhabitants of Andover, a certain lot of land situated in said Andover, on the northerly side of the road leading from the house of S. Gilman Bailey to Lowell, bounded and described as follows viz; beginning at the northeasterly corner of said lot on said road at land of said grantee; thence by said road southerly four hundred ninety two feet to land of Bennett; thence by said Bennett land westerly twenty feet more or less to Baggetts Pond; thence northerly by said Pond four hundred seventy five feet more or less, to land of said grantee; thence easterly by land of said grantee one hundred twenty feet more or less to said road at the bound first named. Containing 33,810 square feet of land more or less. To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging to the said Inhabitants of Andover and their assigns, to their own use and behoof forever. And we hereby for ourselves and our heirs, executors and administrators covenant with the grantee and their assigns that we - lawfully seized in fee simple of the granted premises, that they are free from all incumbrances that we have good right to sell and convey the same as aforesaid; and that we will and our heirs, executors, and administrators shall warrant and defend the same to the grantee and their assigns forever against the lawful claims and demands of all persons. And for the consideration aforesaid we Laura J. Hardy wife of said Edward S. Hardy and Alice C. Hardy wife of said Frederick L. Hardy hereby release unto the grantee and their assigns all right of or to both dower and homestead in the granted premises. In witness whereof we the said Edward S. Hardy, Laura J. Hardy, Frederick L. Hardy and Alice C. Hardy hereunto set our hands and seals this twenty sixth day of June in the year one thousand eight hundred and ninety six.

Signed, sealed and delivered } Edward S. Hardy (seal)  
 in presence of George W. Foster } Laura J. Hardy (seal)  
 Justice of the Peace } Frederick L. Hardy (seal)  
 Commonwealth of Massachusetts } Alice C. Hardy (seal)  
 Essex ss. June 26<sup>th</sup>

1896. Then personally appeared the above named Edward S. Hardy and acknowledged the foregoing instrument to be her free act and deed, before me, George W. Foster, Justice of the Peace.

Received and recorded May 4, 1897 at 11-20 A.M. attest. Arctas R. Sanborn Reg' r.